STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN EDWARD RAY,

Defendant-Appellant.

UNPUBLISHED
September 9, 2003

No. 240843
Oakland Circuit Court
LC No. 01-179734-FH

Before: O'Connell, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for three counts of second-degree criminal sexual conduct involving a child under the age of thirteen, MCL 750.520c(1)(a). Defendant was sentenced as a second habitual offender, MCL 769.10, to 2 to 26-1/2 years imprisonment. We affirm.

Defendant's first issue on appeal is that his conviction should be reversed because the trial court abused its discretion when it allowed three witnesses to testify about prior bad acts. We disagree.

Defendant is the victim's grandfather. Defendant was convicted in 1989 of gross indecency between males, MCL 750.338, for one act he committed on his son, who is the victim's father. Defendant argues that the prosecutor did not provide sufficient notice under MRE 404(b) to offer testimony from the victim's mother and the officer in charge of this case. Both the victim's mother and the officer in charge provided testimony about the prior uncharged acts that occurred between defendant and defendant's son. Defendant also argues lack of notice under MRE 404(b) with regard to the testimony of defendant's former wife, who is also the mother of the victim in the 1989 case. Defendant's former wife provided testimony regarding prior uncharged acts that occurred between defendant and defendant's son and between defendant and defendant's daughter.

Although defendant argues on appeal that the testimony from the victim's mother and the officer was improper evidence under MRE 404(b), defense counsel failed to make these objections at trial and therefore, these issues are unpreserved. See MRE 103(a)(1); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

The decision whether other acts evidence under MRE 404(b) "is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Furthermore, appellate courts will review unpreserved issues for plain error affecting the defendant's substantial rights. *People v Jones*, 468 Mich 345, 382; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

MRE 404(b)(2) provides:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence.

The prosecutor filed a notice of MRE 404(b) evidence, which notified defendant that the prosecuting attorney intended "to produce other acts evidence at trial for the purpose of proving intent, lack of mistake or accident, and/or common plan or scheme. This evidence will come from the testimony of [defendant's son]. This evidence can be found in the police reports previously provided to the defendant." If the evidence at issue is "relevant and not substantially more prejudicial than probative," and thus, admissible, "notice to [defendant] would not have had any effect on whether the trial court should have admitted it at trial." *People v Hawkins*, 245 Mich App 439, 455; 628 NW2d 105 (2001). Although the prosecution's notice stated that the evidence would come from defendant's son, the rule states that notice of the "general nature" of the evidence is required, and the prosecution met that burden.

The testimony about defendant's daughter was an unresponsive answer to a proper question, and the prosecutor did not reference it in her opening statement or closing argument. In fact, notice of defendant's former wife's testimony regarding their daughter would not have been possible because the prosecutor did not intend to delve into those prior acts. The prosecutor agreed "that the comment with regards to [defendant's daughter] has no part in this particular trial."

Whether the trial court's admission of prior acts evidence constitutes an abuse of discretion turns on application of MRE 404(b)(1), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) is a rule of inclusion that contains a nonexhaustive list of exceptions. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). To qualify as admissible under MRE 404(b), the other acts evidence must satisfy a four-prong test:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).]

The prosecutor's notice stated that the evidence was being offered, "for the purpose of proving intent, lack of mistake or accident, and/or common plan or scheme."

"[E]vidence of similar misconduct is logically relevant to show that the charged act occurred" if the offenses are "sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Here, the challenged evidence is prior acts of criminal sexual conduct against defendant's son. As in *Sabin, supra,* the incidents with the victim and defendant's son share sufficient common features to infer a plan or scheme. The victim, in the present case, and defendant's son were both six years old when the molestation began, the incidents of fondling were similar in nature, and there is evidence that defendant committed the acts in his home, taking advantage of the family relationship he had with the victims. "[E]vidence of other instances of sexual misconduct that establish a scheme, plan, or system may be material in the sense that the evidence proves that the charged act was committed." *Sabin, supra* at 61-62, discussing *People v Engelman*, 434 Mich 204, 211-214; 453 NW2d 656 (1990). See also *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996).

The victim's parents were going through a divorce when the allegations against defendant were made, and defense counsel theorized that the victim's mother had fabricated the charges to gain some sort of advantage in her divorce. When the defendant claimed that the victim's mother had fabricated the charges in *Starr, supra,* the Court found the testimony of prior similar acts "to be admissible evidence to rebut defendant's claim of fabrication of the charges." *Starr, supra* at 501.

Logical relevance is determined by the application of MRE 401 and MRE 402. See *Crawford, supra* at 388. MRE 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "It is well established in Michigan that all elements of a criminal offense are 'in issue' when a defendant enters a plea of not guilty." *Crawford, supra* at 389, quoting *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995). See also *Sabin, supra* at 60; *VanderVliet, supra* at 78. Pursuant to MRE 402, "[a]ll relevant evidence is admissible."

When a defendant contends that the complainant fabricated the entire incident for the complainant's own purpose, evidence of other acts committed by the defendant is "probative of a disputed element of the offense." *Sabin, supra* at 71. To tip the balance in favor of being more probative than prejudicial, the testimony must be "neither so naturally inflammatory nor used so pervasively at trial that we should presume that the prejudice flowing from this evidence unfairly and substantially outweighed its probative value." *Hawkins, supra* at 452. Because defendant denied the charges against him with regard to the victim, the testimony about his prior acts is more probative and is not outweighed by the danger of unfair prejudice.

Defendant argues that the testimony of the victim's mother, the officer, and defendant's former wife is cumulative under MRE 403, which provides "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." The entire testimony from the victim's mother about defendant's prior acts with defendant's son consisted of answering three questions about the extent of her knowledge of defendant's prior acts with defendant's son. Defendant's son testified that defendant had molested him from the time he was six or seven until he was nine or ten. Defendant's son did not remember an incident that occurred when he was sixteen, but he did remember that defendant was convicted at that time for acts involving him. The prosecutor argued that testimony from defendant's former wife about the prior acts was necessary because defendant's son "took the stand and minimized and didn't give all the details that he had given to the police." The officer testified that defendant's son had told him that defendant had molested him from the time he was six until the time he was sixteen, which the trial court allowed for the purpose of impeaching the testimony of defendant's son. Because the testimony of defendant's son was contradictory to his earlier statement about whether defendant had continued to molest him between ages ten and sixteen, neither the victim's mother nor the officer's testimony resolving this issue was cumulative. Because defendant denied the charges against him and defense counsel asserted that the victim fabricated the incidents, the testimony about defendant's prior acts with defendant's son is probative. *Sabin, supra* at 71. Even if the testimony of the victim's mother, defendant's former wife, and the officer were cumulative, the probative value was not outweighed by its cumulative effect and it was admissible under *VanderVliet* and MRE 403. *Sabin, supra* at 71; *VanderVliet, supra* at 78.

Immediately after the testimony of defendant's former wife and again during the jury charge, the trial court instructed the jury not to consider the testimony about defendant's other acts for any other purpose than to determine that defendant "used a plan, scheme, or characteristic scheme that he has used before or since." This instruction satisfies the final *VanderVliet* prong that a trial court may provide a limiting instruction to a jury. *VanderVliet, supra* at 75.

When defendant's former wife testified that defendant had molested their daughter, defendant moved for a mistrial, and no mention was made of this incident again. This Court will not reverse a trial court's denial of a mistrial absent an abuse of discretion. *People v Allen*, 429 Mich 558, 656; 420 NW2d 499 (1988); *Griffin, supra* at 36. "[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *Id.* at 36, quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Because the reference to defendant's molestation of his daughter was an unresponsive and volunteered answer to a proper question, the trial court did not abuse its discretion when it denied defendant's motion for a mistrial.

The issue of MRE 404(b) admissibility of the victim's mother and the officer's testimony was not raised at trial, and, therefore, it must be reviewed for plain error. See *Jones, supra* at 382; *Carines, supra* at 762-763. To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant bears the burden of establishing that: 1) error occurred, 2) the error was plain, i.e., clear or obvious, and 3) the plain error affected substantial rights. *Jones, supra* at 382; *Carines, supra* at 763, applying *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Because defendant denied the charges and asserted that the victim fabricated the charges, the testimony of both the victim's mother and the officer is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice. *Sabin, supra* at 71; *VanderVliet, supra* at 78. The judge also provided a limiting instruction to the jury about the prior acts testimony, which satisfies the final prong of the *VanderVliet* admissibility test. *VanderVliet, supra* at 75. Thus, there was no plain error with regard to the testimony of the victim's mother or of the officer. *Jones, supra* at 382.

Defendant's final issue on appeal is that he is entitled to resentencing because the trial court abused its discretion in scoring PRV 2 at five instead of zero when more than ten years had elapsed between the time he was discharged from probation and the time he committed his next offense. We disagree.

Because this case presents an issue concerning the proper scoring of sentencing guideline variables, it is reviewed for abuse of discretion. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); *People v Leversee*, 243 Mich App 337, 348-349; 622 NW2d 325 (2000). If the minimum sentence imposed is within the appropriate guidelines range, the Court must affirm the sentence, unless the trial court erred in scoring the guidelines. MCL 769.34(10); See *People v Babcock*, ___ Mich ___; 666 NW2d 231 (2003); *Leversee, supra* at 348. The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score. *Hornsby, supra* at 468. Defendant was discharged from probation on March 18, 1991. Although the complaint alleges that the offense occurred "[o]n or About March 7, 2001 – June 7, 2001," the earliest date for which evidence was presented at trial was March 31, 2001. MCL 777.50 provides:

> (1) In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.
>
> (2) Apply subsection (1) by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables.

Because the record lacks evidence to support the score of five for PRV 2, the trial court abused its discretion.

Pursuant to MCL 777.16y, second-degree criminal sexual conduct, MCL 750.520c, is a Class C felony. Using the corrected PRV 2 score of twenty and the OV Level II, MCL 777.64 yields a minimum sentence range of twelve to twenty-four months' imprisonment for a Class C felony. Because defendant was sentenced as a second habitual offender, the upper limit of the recommended minimum sentence range is increased by twenty-five percent, pursuant to MCL 777.21(3)(a), and the upper limit becomes thirty months' imprisonment. The trial court sentenced defendant to minimum terms of twenty-four months' imprisonment, which is within the recalculated minimum sentence guidelines range of twelve to thirty months.

An erroneous scoring of the guidelines range does not require resentencing if the trial court would have imposed the same sentence regardless of the error. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003). In *Mutchie*, this Court stated that even if the offense variables were improperly scored, the error was harmless because the trial court would have imposed the same sentence. *People v Mutchie*, 251 Mich App 273, 275; 650 NW2d 733 (2002). The trial court stated that, even if it had rescored PRV 2 as argued by defendant, the sentence "will still be within the guidelines." Because it appears that the court would have imposed the same sentences regardless of the PRV 2 score and the sentences are within the recalculated minimum sentence guidelines range, resentencing is not warranted. *Id.*

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood